

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

In the Matter of)	
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42
)	
Lifeline and Link Up)	WC Docket No. 03-109
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Advancing Broadband Availability Through Digital Literacy Training)	WC Docket No. 12-23

PETITION FOR WAIVER OF UTPHONE, INC.

UTPhone, Inc. (“UTPhone”), by its attorneys and pursuant to Section 1.3 of the Commission's rules, hereby requests a waiver of Sections 54.413(a) and 54.414(a) of the Commission's rules (47 C.F.R. §§ 54.413(a), 54.414(a)). The grounds for this waiver are set forth below.

I. INTRODUCTION

UTPhone is a small, primarily wireline competitive telecommunications carrier (CLEC) in the state of Oklahoma, founded in 2004. Since August 2006, it has also been a Low Income Eligible Telecommunications Carrier (ETC), serving about 24,000 customers in Oklahoma.¹ Ninety-five percent (95%) of UTPhone’s customers are low income wireline subscribers in Oklahoma, residing virtually entirely on Tribal lands, who qualify for service under the Commission’s Lifeline and (until recently) Link Up programs.

Recently, UTPhone has acquired and constructed significant broadband network facilities, becoming a facilities-based CLEC for the first time. To date, UTPhone has been a Low Income-only and wireline-only ETC, not participating in or drawing support from the High

¹ Okla. Corp. Comm. Order No. 527973, Cause No. PUD 200600090 (granted Aug. 2, 2006).

Cost Fund of the Universal Service Fund (USF). Now that it has established broadband facilities infrastructure, however, it hopes to participate in the new Connect America Fund and possibly the Mobility Fund and the upcoming Low-Income Broadband Pilot Program² authorized under the Commission's recent *Lifeline and Link Up Reform and Modernization* Report and Order.³

As a small Low Income ETC serving consumers predominantly on Tribal lands in Oklahoma, UTPhone is a local company that has fulfilled the statutory and public interest objectives of the Commission's Low Income program by filling a valuable niche in offering competitive, high-quality, locally-oriented wireline telecommunications services focused specifically on the particular needs and demographics of low income Oklahomans residing on Tribal lands. Still, as the Commission has recognized, Oklahoma has a very low broadband adoption rate on its Tribal lands; indeed, high speed broadband has been unavailable to many of these consumers until now. With its new and growing broadband network infrastructure, UTPhone is now poised to add a high speed broadband service component to its bundle of offerings to these low income consumers who are struggling to move into the Internet age.

Critically, as a *wireline* ETC serving these remote and sparsely populated lands, UTPhone and its customers have depended to a significant degree on the Tribal Link Up as well as the Lifeline elements of the Commission's Low Income Program, because, as the Commission has repeatedly stressed, there remain significant installation and activation costs related to the establishment of landline service to customers in these impoverished and remote areas.⁴ Indeed, UTPhone and its customers are the very archetypes of the kind of service provider and low

² See Public Notice DA 12-683, rel. April 30, 2012.

³ *Lifeline and Link Up Reform and Modernization*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket Nos. 11-42 *et al.*, FCC 12-11 (rel. Feb. 6, 2012) (the "*Lifeline/Link Up Order*").

⁴ See *id.* The cost of installing a customer on UTPhone's network is approximately \$275 per subscriber. This cost includes network equipment, customer premise equipment and the labor to install. UTPhone's tariffed installation rate for telephone service is \$130.

income consumers that were contemplated by the Commission in establishing and in recently retaining the Tribal Link Up program alongside the Lifeline program.

II. THE REGULATORY GAP ON TRIBAL LANDS

Incongruously, however, because UTPhone is a wireline Low Income ETC that is newly facilities-based and thus has not to date drawn support from the federal High Cost Fund, it finds that it has fallen into a regulatory gap in the wake of the combined rule revisions adopted by the Commission's new *Lifeline/Link Up Order* and its recent *USF/ICC Transformation Order*.⁵ That is, UTPhone is a facilities-based wireline provider in Tribal lands that should, under the *Lifeline/Link Up Order*, continue to be eligible for Tribal Link Up support. However, the particular nomenclature of the revised definitional section 54.413(a) of the rules requires an eligible carrier to *already* be “receiving high-cost support on Tribal lands pursuant to subpart D” of Part 54 of the Commission's USF rules⁶— yet, as a competitive carrier rather than an ILEC or RLEC, UTPhone now appears to be *precluded* by the *USF/ICC Transformation Order* and its revised rule 54.307(e)⁷ from qualifying to receive such support on a going forward basis.

Specifically, as part of the transition from the High Cost Fund to the new “Connect America Fund” mandated by the *USF/ICC Transformation Order* and the new rules adopted therein, the Commission decided to phase out high cost support for CETCs. Further, in revising section 54.307 of the rules to establish the amount of support to be phased down at a “baseline support amount equal to its total 2011 support in a given study area,”⁸ the Commission in effect precluded any *new* (post-12/31/11) high cost ETC from “receiving [any] high-cost support,” as

⁵ *Connect America Fund et al.*, WC Docket Nos. 10-90 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) (the “*USF/ICC Transformation Order*”).

⁶ 47 C.F.R. § 54.413(a) (emphasis added).

⁷ 47 C.F.R. § 54.307(e).

⁸ 47 C.F.R. § 54.307(e).

the new Tribal Link Up rules require⁹—inasmuch as the “baseline support amount” for a new high cost CETC designated after 2011 will always be zero. As a result, UTPhone has fallen into a regulatory Catch-22: the new Lifeline rules (§§ 54.413(a) and 54.414(a)) require an ETC to be presently “receiving high-cost support in Tribal lands” as a precondition to receiving Tribal Link Up, even as a new USF rule (§ 54.307(e)(1)) prevents UTPhone from receiving such support.

Thus, UTPhone finds itself checkmated from continuing to be eligible for Tribal Link Up support that is critical to its ability to provide its customers with competitive Lifeline service, as well as bundled and unbundled broadband services, even as the entrenched ILECs in its service areas continue to receive that support. This bizarre result is in clear derogation of the stated intent of the Commission’s new rules and its policy decision to continue enhanced Link Up with respect to ETCs who are deploying network infrastructure in Tribal lands. Accordingly, inasmuch as UTPhone is a facilities-based Low Income ETC that otherwise qualifies to be a high cost ETC, and that it *would* have been able to “receive” high-cost support but for the separate new rule that precludes *new* high cost CETC support after December 31, 2011, UTPhone respectfully submits that it merits a waiver of that part of revised rules 54.413(a) and 54.414(a) that limits eligibility for Tribal Link Up support to a Low Income ETC that “is receiving” high-cost support on Tribal lands.

III. UTPHONE CLEARLY MEETS THE STANDARD FOR OBTAINING A WAIVER

A. Standards of Law

The Commission may waive any provision of its rules on its own motion and for good cause shown.¹⁰ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.¹¹ In addition, the Commission may take into account

⁹ 47 C.F.R. §§ 54.413(a), 54.414(a).

¹⁰ 47 C.F.R. § 1.3.

¹¹ *Northeast Cellular Telephone Co. v. FCC*, 897 F. 2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”).

considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹² In sum, waiver is appropriate if special circumstances warrant deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹³ The Wireline Competition Bureau has recently invoked these standards in issuing waivers of other rules adopted in the *Lifeline/Link Up Order*.¹⁴

B. The Particular Facts of This Case Make Strict Compliance With the New Rules Inconsistent With the Public Interest

Good cause for this requested waiver exists because its grant would in fact serve the key objectives of the Commission's new *Lifeline/Link Up Order*. That *Order* explicitly seeks to “advance the availability of Lifeline and Link Up support for low income consumers living on or near Tribal lands.”¹⁵ Accordingly, while the Commission found that Link Up support generally should be ended, it decided that “given the significant telecommunications deployment and access challenges on Tribal lands . . . at the present time we will maintain enhanced Link Up support for those ETCs that also receive high-cost support on Tribal lands.”¹⁶

The Commission decided to limit Tribal Link Up only to ETCs “that also receive high-cost support on Tribal lands” on the rationale that “[c]onsistent with the intent of the enhanced Link Up program, those ETCs are building telecommunications infrastructure on Tribal lands, which have significant telecommunications deployment and connectivity challenges.”¹⁷ It explained that “[w]hen the Commission first established the expanded Link Up program for Tribal lands, it observed that doing so would create incentives for carriers to construct facilities

¹² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-1159 (D.C.Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972).

¹³ *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ See Public Notice, DA 12-689, rel. May 1, 2012.

¹⁵ *Lifeline/Link Up Order*, FCC 12-11 (rel. Feb. 6, 2012), ¶ 60 (emphasis added). See also *id.* at ¶¶ 149, 480; *Twelfth Report and Order* in CC Docket No. 96-45, 15 FCC Rcd 12208 (2000) (“2000 Tribal Lifeline Order”).

¹⁶ *Id.* at ¶ 245. See also *USF/ICC Transformation Order* at ¶¶ 479-482.

¹⁷ *Id.* at ¶ 254.

where none existed.”¹⁸ Indeed, the Commission repeats its determination that Tribal Link Up should be limited to ETCs that “are building telecommunications infrastructure on Tribal Lands” several more times in the *Order*.¹⁹ Moreover, it even explains its limitation to high cost recipients as a method of preventing Lifeline ETCs from receiving Tribal Link Up support “without building infrastructure.”²⁰

Thus, in drafting the new rule here at issue, the Commission equated high cost ETCs with those who “build infrastructure,” and chose to continue Tribal Link Up only for those carriers (and their customers) who serve the public interest in deploying telecommunications facilities to these remote and underserved populations. Clearly, therefore, the Commission conceived its “receiving high-cost support” language as an indicator of carriers who deploy facilities, rather than because of any intrinsic virtue in the fact that such carriers typically draw high cost support under the USF. In other words, it should not matter whether a provider that is deploying facilities in Tribal lands is an actual current recipient of High Cost Fund support.

UTPhone is just such a Tribal lands carrier that is deploying advanced broadband infrastructure in these areas, including to areas which currently have no such facilities through the ILEC; but it has done so *without* drawing from the federal High Cost Fund. It has, however-- until April 1 of this year-- been receiving Tribal Link Up support, which has been critical to its ability to connect low income consumers in its Tribal land service areas to its Lifeline service. UTPhone’s recently expanded network provides broadband as well as dial tone local voice service to multiple communities and areas that were previously unserved or underserved by

¹⁸ *Id.* at n. 655, citing 2000 Tribal Lifeline Order, 15 FCC Rcd at 12239-40, ¶ 60.

¹⁹ *See id.* at nn. 687, 690.

²⁰ *Id.* at n. 689.

broadband.²¹ Thus, far from exploiting Link Up support to subsidize general operations rather than to support actual connection costs, which behavior the Commission cited in the recent *Lifeline/Link Up Order* in deciding to end Link Up in non-Tribal areas, UTPhone is fulfilling the objectives of Tribal Link Up by actually connecting low income consumers in these remote lands, and now by offering first-time broadband service as well.

Simply stated, however, UTPhone has experienced the unfortunate timing of undertaking the deployment of this facilities infrastructure for its customers in Tribal lands at the very moment that the Commission has precluded such carriers from becoming high cost fund recipients on a going forward basis. As shown above, even as the new Lifeline rules (§§ 54.413(a) and 54.414(a)) require an ETC to be presently “receiving high-cost support in Tribal lands” as a precondition to receiving Tribal Link Up, a new USF rule (§ 54.307(e)(1)) prevents UTPhone from receiving such support.²² UTPhone and its low income Oklahoma Tribal lands customers should not be disadvantaged by this accident of timing, to the ultimate detriment of those customers and to competition in the local marketplace. UTPhone is deploying new, advanced network infrastructure to its Tribal lands service areas, fully fulfilling the meaning and intent of the Tribal Link Up limitation in definitional rule 54.413(a), as well as furthering the Commission’s key objective of bringing broadband as well as basic voice service to low income end users in these lands. It should be permitted to receive Tribal Link Up support to the same degree, on the same basis and for the same reasons as its ILEC and RLEC competitors.

²¹ UTPhone’s current facilities are comprised of a hybrid wireless and fiber middle-mile network that currently consists of 81 towers or access points covering a 500 square mile area, all of which are located on Tribal lands. The wireless network ring configuration utilizes unlicensed ISM bands in the 2.4GHz, 5.8GHz and 900 MHz ranges as specified by IEEE 802.11 a/b/e/g/n specifications. Additionally, local distribution and backhaul is provided by the optimal configuration utilizing both unlicensed and licensed frequencies in the 5.470 to 5.850 GHz RF bands and 18 GHz and 11 GHz bands. The network is currently serving 6,000 subscribers, with capacity to serve an additional 4,000 as currently configured. Hardware upgrades to the wireless backhaul links on the existing towers will allow expansion to support an additional 20,000 subscribers. Currently under construction are an additional 34 towers capable of serving more than 34,000 subscribers and increasing the geographic coverage to 700 square miles on Tribal lands.

²² See discussion *supra* at pp. 3-4.

C. Considerations of Hardship, Equity and More Effective Implementation of Overall Policy on an Individual Basis Demand Grant of a Waiver in This Case

UTPhone seeks to better serve its existing and future Tribal lands Lifeline customers with new, high speed broadband infrastructure and through bundled service offerings of Lifeline voice and broadband service. All of these features further key goals of the Commission's new *Lifeline/Link Up Order*,²³ as well as of the Commission's *National Broadband Plan*²⁴ and its 2000 *Tribal Lifeline Order*.²⁵ Simply put, UTPhone needs continued Tribal Link Up support in order to continue to serve its present customers, as well as to fulfill its plan to push out these expanded facilities-based advanced services to low income consumers in its underserved Tribal lands service areas. Accordingly, it seeks a simple waiver of the new rule provision that limits continuing Tribal Link Up support to ETCs that "are receiving high-cost support," inasmuch as UTPhone has not to date sought high-cost support, and, as a CETC, it is precluded from seeking high cost ETC support since December 31, 2011. Grant of this waiver will strongly foster the overall goals of the new rules.

The Commission surely did not intend to dis-incent the development of new network infrastructure in Tribal lands, including high speed broadband, in adopting the new *Lifeline/Link Up Order*. To the contrary, both in that *Order* and in the National Broadband Plan, the Commission has consistently strived to develop and maximize such infrastructure in these uniquely disadvantaged and underserved areas.²⁶ Yet, absent a waiver in this case, the

²³ *Lifeline/Link Up Order* at ¶¶ 310-315, 321 *et seq.*

²⁴ Federal Communications Commission, *Connecting America: The National Broadband Plan*, rel. Mar. 16, 2010, *especially at* pp. 152-153, 172-173.

²⁵ 2000 *Tribal Lifeline Order*, *supra* note 13, 15 FCC Rcd 12208 (2000).

²⁶ Indeed, in recent testimony before the U.S. Senate Committee on Indian Affairs, Commissioner Clyburn emphasized that the Commission's recent reforms designed to enhance support to Tribal lands notably included "maintain[ing] the Tribal Link Up program, while otherwise eliminating Link Up on non-Tribal Lands, recognizing that Tribal consumers should continue to be eligible for enhanced Lifeline and Link Up support above levels on non-Tribal Lands," without reference to any tied requirement to receive or accept high cost support. *See* Testimony of

unintended consequence and coincidence of the *USF/ICC Transformation Order*'s limitation on high cost CETCs and the *Lifeline/Link Up Order*'s limitation of Tribal Link Up to high cost ETCs would yield exactly that perverse result in undermining and very possibly defeating UTPhone's ability to extend new broadband facilities infrastructure to low income populations on Tribal lands. To be clear: UTPhone seeks only parity with the support that its ILEC and RLEC competitors continue to receive-- namely, continued Tribal Link Up support, for as long as those other entities continue to receive such support.²⁷ UTPhone's low income Tribal land customers should not be deprived of a choice in facilities-based Lifeline/Link Up service because of this unintended anomaly in the interplay among its new rules.

IV. THE COMMISSION SHOULD GRANT THIS PETITION ON AN EXPEDITED BASIS

UTPhone respectfully requests that the Commission, through the Wireline Bureau by delegated authority, grant this Petition as expeditiously as possible, to allow UTPhone to serve new customers using Tribal Link Up support, on the same basis as the ILECs or RLECs in its Tribal land service areas, with a minimum of disruption to those customers, as well as to enable many of these consumers to obtain broadband service for the first time.

V. CONCLUSION AND PRAYER FOR RELIEF

As shown in the foregoing, this request clearly satisfies the Commission's well-established standard that "waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule."²⁸

Commissioner Mignon L. Clyburn before the United States Senate Committee on Indian Affairs, "Universal Service Fund Reform: Ensuring a Sustainable and Connected Future for Native Communities," June 7, 2012, at p. 3.

²⁷ UTPhone recognizes that the continuing status of Tribal Link Up is under review in the pending *Further Notice of Proposed Rulemaking* in WC Dockets 11-42 *et al.*

²⁸ *Northeast Cellular*, 897 F.2d at 1166.

Accordingly, UTPhone respectfully requests an expedited waiver of the “receiving high-cost support” language of new rule sections 54.413(a) and 54.414(a), so as to allow it to receive Tribal Link Up support irrespective of whether it is “receiving high-cost support pursuant to subpart D of this part.”

Respectfully submitted,

UTPHONE, INC.

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June 21, 2012

DECLARATION

I, Jason Ledlow, do hereby declare under penalty of perjury that I am President of UTPhone, Inc., the Petitioner in this matter; that I have the requisite authority to make the representations contained herein; that I have read the foregoing Petition for Waiver, and am familiar with its contents; and that the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

Signed this 18th day of June, 2012

UTPhone, Inc.

Signed: _____

